IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE SIDE, JURISDICTION

CRIMINAL WRIT PETITION NO.1981 OF 2005

Mhaisarali Ramzanali Khan)
Age: 28 years,)
Residing at Waghoba Nagar,)
Main Railway Line,)
Kalwa (East), Dist.Thane.) PETITIONER

Versus

1. Shri.D.Sivanandan,)
Commissioner of Police,)
Thane.)
)
2. The State of Maharashtra)
)
3. The Superintendent Nasik)
Road, Central Prison, Nasik.) RESPONDENTS.

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Mr. U.N.Tripathi, Advocate for the Petitioner.

Mrs. A.S.Pai, APP for the State.

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CORAM : D.G.DESHPANDE &
SMT.V.K.TAHILRAMANI, JJ.

DATED : MARCH 23, 2006.

ORAL JUDGMENT (PER TAHILRAMANI,J.)

1. Through this Petition under Article 226 of the Constitution of India, the petitioner-detenu has impugned the order of detention dated 21st April, 2005 passed by respondent No.1 Shri D.Shivnandan, Commissioner of Police, Thane. By the said order, the detenu came to be detained under Sub-Section (1) of

Section 3 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-offenders and Dangerous Persons Act, 1981 (hereinafter referred to as the MPDA Act). The detention order alongwith grounds of detention dated 21st April, 2005 was served on the petitioner-detenu on 25th April, 2005.

2. A perusal of the grounds of detention would show that the impugned detention order is founded on three C.Rs i.e. C.R.No.284 of 2004 of Vartaknagar Police Station under Sections 395, 397 of IPC R/w Sections 3, 25(a), (b) of Indian Arms Act; C.R.No.436 of 2004 of Chembur Police Station under Sections 395, 397, 452, 427 of IPC R/w Sections 3, 25 of Indian Arms Act; and C.R.No.5 of 2005 of Thanenagar Police Station under Sections 399, 400 of IPC R/w Sections 3(25), 4(25) of Indian Arms Act and Sections 37(1), 135 of Bombay Police Act.

. The facts relating to C.R.No.284 of 2004 are that, "Nakoda Jewellers" is situated at Pawar Nagar, Thane. On 27.12.2004, the petitioner alongwith other gang-members went near "Nakoda Jewellers". The gang-members, who were armed, including the detenu went into the jewellery shop. Thereafter, jewellery shop came to be looted at the point of deadly weapons. Due

to noise, the neighbouring shopkeepers came forward to see what had happened. At that time one of the co-accused Jabirali threatened them at the point of firearm, hence they all retreated, returned to their shops, put down the shutters and confined themselves inside their shops. The women and school going children passing by the road, noticed the incident and they ran helter skelter, due to fear. Due to dacoity in broad day light in busy locality, the atmosphere become tense. Immediately after the incident was over, the gang members ran away with gold ornaments of the value of Rs.4,28,000/-.

. The facts relating to C.R.No.436 of 2004 are that Cell Phone Shop was looted at the point of deadly weapons. In this case, the associates of the detenu i.e. the gang leader Mehmood and two others entered into the Cell Phone Shop and threatened the complainant, servants and customers in the shop. The detenu and one other associate entered into the shop at a much later stage.

. As far as C.R.No.5 of 2005 is concerned, an information was received that a gang of seven to eight dacoits were going to assemble at CIDCO Bus Stop, near Manish Hotel, with an intention to commit dacoity at

some jewellery shop. On receipt of information, Police went to the spot. They found that detenu and other gang members had gathered there with an intention to commit dacoity and the accused persons including the detenu were armed with deadly weapons. The detenu and his other gang members came to be apprehended.

3. We have heard Mr.Tripathi learned Advocate for the petitioner and Mrs.Pai learned APP for the State. Although, in this Writ Petition many grounds have been pleaded, Mr.Tripathi has only pressed one ground i.e. Ground No.7(A). Ground No.7(A) is as under :

> "7(A). The petitioner says and submits that the order of detention is unjustified and unwarranted since the petitioner was already in Judicial Custody on the date of order passed i.e. on 21-04-2005. The petitioner says and submits that being in custody he was already prevented from acting in any manner prejudicial to the maintenance of Public Order. The petitioner has never applied for bail before any Court of Law. More particularly looking to the seriousness of the case i.e. armed dacoity, it is not possible to avail bail under normal law of land. The petitioner says and submits that there are no material before the detaining authority to come to such conclusion that there is imminent possibility of the release of the petitioner in near future. This shows total non-application of mind of the detaining authority. The order of detention is illegal and bad in law, ought to be quashed and set aside."

4. Mr.Tripathi submitted that the detenu was in

custody and the apprehension that the detenu was likely to be released from custody was not supported by any material. Mr.Tripathi submitted that in such case, the detention order is likely to be set-aside. Mr.Tripathi placed reliance on the decision of the Apex Court in the Case of **"Dharmendra Suganchand Chelawat & Anr. Vs. Union of India & Ors.," reported in AIR 1990 Supreme Court 1196.** Mr.Tripathi placed reliance on Para-19 of the said decision, which reads as under :

> **"19.** The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i)the detaining authority was aware of the fact that the detenu is already in detention and (ii)there was compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."

5. If the case of Dharmendra Chelawat(Supra) on which Mr.Tripathi placed reliance, is considered, in the present case, it is seen that the detaining authority was aware that the detenu was in custody.

The compelling reasons justifying the passing of detention order are set-out in the grounds of detention. The detaining authority has set-out the reasons why he apprehended that the detenu was likely to be released from custody in the near future; and taking into account the criminal activities of the detenu, the detaining authority was subjectively satisfied that if the detenu was released from custody, he would again indulge in activities which are prejudicial to the maintenance of Public Order, and hence it was necessary to detain him in order to prevent him from engaging in such activities in future. We find that all the criteria set out in para 19 of Dharmendra's case is met in the present case.

. Moreover, it is seen that in the case of Dharmendra Chelawat(Supra), the detenu was involved in a case under the NDPS Act. The NDPS Act contains very stringent provisions as far as the bail is concerned. Section 37 of the NDPS Act reads as under :

> **"[37. Offences to be cognizable and non-bailable.--** (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) --
> (a) every offence punishable under this Act shall be cognizable;
> (b) no person accused of an offence punishable for [offences under section 19 or section 24 or Section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless--
> (i) the Public Prosecutor has been given

> an opportunity to oppose the application for such release, and
> (ii) where the Public Prosecutor oppose the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.]"

. Thus, Section 37 of NDPS Act provides for additional fetters as far as bail is concerned. As far as the offences under IPC are concerned, the provisions of IPC are not as stringent as those under the NDPS Act. Moreover, in the case of Dharmendra Chelawat, the detenu had already preferred an application for bail, which had been rejected just a few days before passing of the detention order. As stated earlier, the detenu in the present case is involved in Cases under IPC only, where the provisions are not so stringent. Moreover, he had not preferred any application for bail till the time that the detention order was passed. In such case, it would be reasonable to presume that the detenu would prefer an application for bail in the near future. Thus, the case of detenu in case of Dharmendra Chelawat cannot be equated with that of the present detenu.

6. Ground 7(A) raised in the petition has been replied to by the Detaining Authority in Para-9 of his return. Although, the reply is in detail, briefly stated, it shows that the detaining authority was aware of the fact that the detenu was already in custody in the three C.Rs.. The reply shows that though there was recovery of gold ornaments at the instance of the detenu he was not identified by any of the witnesses in C.R.No.284 of 2004. Hence the detaining authority was of the opinion that the detenu was likely to be released on bail in the near future. As far as C.R.No.5 of 2005 is concerned, the detaining authority has stated that said case is under Sections 399 and 402 of IPC and normally in such cases, bail is granted. As far as C.R.No.436 of 2005 is concerned, the detenu has been identified by only one witness and after going through the record, it is seen that no specific role of pointing the weapon at any one or threatening anyone is ascribed to him. Looking to the criminal activities of the detenu, the detaining authority was subjectively satisfied that detenu would continue to indulge in similar activities in future and hence it was necessary to detain him. The compelling reasons justifying the detention have been spelled-out by the detaining authority in the grounds of detention and in his reply.

7. Thereafter, Mr.Tripathi submitted that the detenu is involved in Cases under Sections 395 and 397 of IPC. In other cases, wherein the detenu was in custody in Cases under Sections 395 and 397 of IPC, this Court came to conclusion that it was reasonable to conclude that there was no cogent material on the basis of which the detaining authority could have inferred that the detenu was likely to be released from custody in the near future. Looking to the role of the detenu and the facts of the case, this Court held that there was no cogent material before the detaining authority to come to the conclusion that the detenu was likely to be released from custody. In support of the above submission, Mr.Tripathi placed reliance on the decision of this Court dated 28th February, 2002 in Criminal Writ Petition No.1536 of 2001 in the case of **"Shri Asit Sadhan Mandal Vs. Shri M.N.Singh and Ors."**

8. As far as the case of Asit Mandal(Supra) is concerned, on which Mr.Tripathi placed reliance, it is seen that the role of the detenu therein was that the detenu was armed with a deadly weapon like Chopper. Detenu placed the chopper on the neck of Mr.Lalsing and thereafter snatched gold. Looking to these facts, this Court came to the conclusion that when the detenu was in custody for nearly four and half months and he had

not preferred application for bail, it would be reasonable to conclude that there was no cogent material before the detaining authority to infer that the detenu was likely to be released from custody in the near future.

9. However, as far as the present detenu is concerned, his role cannot be equated with the role of the detenu in the case of **"Shri Asit Sadhan Mandal Vs. Shri N.N.Singh and Ors."** The detenu is involved in three cases. As far as C.R.No.284 of 2004 is concerned, though, there is recovery of gold ornaments at the instance of the detenu, the detenu has not been identified by any witnesses in the said case as having taken part in the incident. Though, the witnesses were called upon to identify the detenu in the test identification parade, none of the witnesses have identified him as being taken part in the said incident. As far as C.R.No.436 of 2004 is concerned, in this case the associates of the detenu i.e. the gang leader Mehmood and two others entered into Cell Phone Shop and threatened the complainant, servants and customers in the shop. The detenu and one other associate entered into the shop at a much later stage. However, no specific role has been ascribed to the detenu that he pointed out the weapon at any particular

person. No witness states that the present detenu put the weapon on anybody's throat or stomach or he pointed out the weapon at any one. Thus, the role of this detenu cannot be equated to that of the detenu in the case of **"Shri Asit Sadhan Mandal Vs. Shri M.N.Singh and Ors."**

10. As far as the last case is concerned i.e. C.R.No.5 of 2005, the said case is under Sections 399, 400 of IPC. It is common knowledge that in the case of this nature, normally bail is granted. This offence not being punishable with death or life imprisonment, bail is normally granted. It is also so stated by the detaining authority in his reply. Hence, there was material before the detaining authority that the detenu would be released on bail in this offence.

11. Looking to the facts of the cases in which the present detenu in involved, in our opinion, it was reasonable for the detaining authority to apprehend that the detenu would be likely to be released on bail.

12. As observed earlier by us, there was sufficient material before the detaining authority to be subjectively satisfied that the detenu would be granted bail and if released on bail, he would again indulge in

similar activities in future. For the said reasons, we reject this submission.

13. In the result, this Petition is dismissed and rule is discharged.

(D.G.DESHPANDE,J.)

(SMT.V.K.TAHILRAMANI,J.)